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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975.

No. 75-917

RICHARD W. HOSTROP,

Petitioner,

vs.

BOARD OF JUNIOR COLLEGE DISTRICT NO. 515, COUNTIES OF COOK AND WILL AND STATE OF ILLINOIS, A BODY POLITIC AND CORPORATE, and JAMES GRIFFITH, ANTHONY HANNAGAN, DORIS HILL, WILLIAM JACKSON, LESTER KLOSS, SHIRLEY MELLECKER and THOMAS PORTER, INDIVIDUALLY AND AS MEMBERS OF THE BOARD OF TRUSTEES,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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To the Justices of the Supreme Court of the United States:

Respondents pray that the requested Writ of Certiorari not issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on September 24, 1975.

OPINIONS BELOW.

The Opinion of the United States Court of Appeals for the Seventh Circuit is reported officially at 523 F. 2d 569 (1975), and is reproduced as Appendix "A" to the Petition. The opinion of the District Court is reported officially at 399 F. Supp. 609 (1974), and is reproduced as Appendix "B" to the Petition.

When this cause was first filed, the District Court dismissed the Complaint for failure to state a claim upon which relief can be granted. That opinion was reported officially at 337 F. Supp. 977 (1972) and is reproduced as Appendix "C" to the Petition. That decision was reversed by the United States Court of Appeals for the Seventh Circuit in a previous opinion, reported officially at 471 F. 2d 488 (1972). That opinion is also reproduced as Appendix "D" to the Petition.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the Petition for Writ of Certiorari.

QUESTIONS PRESENTED.

1. Whether an employee of a State agency whose constitutional rights to due process have been violated by refusing to grant him a hearing may be foreclosed from recovering damages based upon the salary due him under a written employment contract.

2. Whether a State employee's rights to freedom of speech may be denied to him under the guise that it is the manner in which the speech is communicated, rather than the content, which is being punished.

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REASONS FOR REFUSING THE WRIT.

I.

The Court of Appeals' decision concerning the standards by which Petitioner's damages should be measured because of his deprivation of property without proper due process of law is in substantial conformity with other Federal Appellate and Federal District Court decisions. Where a petitioner has successfully demonstrated a denial of constitutionally protected rights, he is at least entitled to damages for deprivation of the right itself and compensation for any personal or pecuniary damage wrought by the deprivation. *Patton* v. *LaPrade*, 524 F. 2d 862, 871-872 (3rd Cir. 1975); *Rolfe* v. *County Board of Education*, 391 F. 2d 77, 81 (6th Cir. 1968); *Donovan* v. *Reinhold*, 433 F. 2d 738, 743 (9th Cir. 1970). If the deprivation were maliciously or willfully motivated the petitioner will, in addition, be entitled to punitive damages. *Patton* v. *LaPrade*, 524 F. 2d 863, 872 (3rd Cir. 1975).

Pecuniary damages for denial or loss of employment resulting from such a deprivation of constitutional rights entitle a petitioner to such compensation as he would have received had he not been deprived of his protected right. *Arkansas Education Association* v. *Board of Education*, 446 F. 2d 763, 770 (8th Cir. 1971); *Rolfe* v. *County Board of Education*, 391 F. 2d 77, 81 (6th Cir. 1968); *Wright* v. *Southeast Alabama Gas District*, 376 F. Supp. 780, 782 (M. D. Ala. 1974). Proof of an unlawful deprivation does not give an automatic right to compensation equal to the pay petitioner would have received had he held the job. "Wages sought must be properly owing to Plaintiff. This requires positive proof that Plaintiff was ordinarily entitled to the wages in question and *being without fault*, would have received them in the ordinary course of things but for

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the inequitable conduct of the party from whom the wages are demanded." *Jinks* v. *Mays*, 464 F. 2d 1223, 1226 (5th Cir. 1972) [Emphasis supplied].

Similar issues regarding compensatory damages for loss or denial of employment have been raised in litigation concerning Title VII violations. The decisions in these cases are in accord with decisions concerning constitutional deprivations. *Parham* v. *Southwestern Bell Telephone Co.*, 433 F. 2d 421, 428 (8th Cir. 1970); *Bing* v. *Roadway Express Inc.*, 485 F. 2d 441, 450-452 (5th Cir. 1973).

In awarding damages, the Court of Appeals in the instant cause claimed that Petitioner would be entitled to recompense for the deprivation of his constitutional right to a hearing, 523 F. 2d 569, 579, and any personal injury (such as possible emotional distress) which resulted therefrom. 523 F. 2d 569, 580. The Court refused to award Dr. Hostrop damages commensurate to the amount he would have received had he completed his employment through the term of this contract, largely because Respondents had demonstrated that he had been afforded a fair hearing he would have been justifiably terminated for cause. 523 F. 2d 569, 579.

The Petitioner asserts that his being denied contract wages as compensatory damages for deprivation of his right to a hearing strips him of the opportunity for effective redress of his rights, and would set a precedent which, in similar situations, would allow a Board of Education to deprive an employee of a constitutionally mandated hearing with impunity. Decisions of this Court and numerous Federal Appellate Courts have consistently held that a plaintiff can obtain effective redress for deprivation of constitutional rights by an award of damages solely for deprivation of the right itself. *Nixon* v. *Herndon*, 273 U. S. 536 (1927); *Sexton* v. *Gelbs*, 327 F. Supp. 134 (N. D. Tex. 1970) aff'd 446 F. 2d 904 (5th Cir. 1971) cert. denied, 404 U. S. 1062 (1972). Moreover, were a defendant to deny a

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plaintiff's clearly defined constitutional rights, plaintiff might in addition recover punitive damages. *Fisher* v. *Volz*, 496 F. 2d 333, 346-48 (3rd Cir. 1974); *Palmer* v. *Hall*, 380 F. Supp. 120, 135 (M. D. Ala. 1974).

The Petitioner states that because the operation of the exclusionary rule and damage relief for violation of fourth amendment rights are independent of the criminal guilt or innocence of the individual attempting to vindicate his constitutional rights, he is automatically entitled to damages for violation of his right to a hearing based on his contract damages. Beside grossly mistaking the workings of the exclusionary rule, such a position is devoid of any logic.

The primary purpose of the exclusionary rule is to deter law enforcement and prosecution officers from violating a citizen's fourth amendment rights. When government agents obtain evidence in willful or negligent disregard of an individual's right to be free from unreasonable searches and seizures, such evidence is therefor excluded. *U. S.* v. *Peltier*, ... U. S. .....; 95 S. Ct. 2313, 2317-2318. The logical counterpart in the instant cause would be the opportunity to recover damages whose assessment would serve as a deterrent against willful disregard of Hostrop's constitutional rights. Such a potential remedy exists in the form of punitive damages. *Patton* v. *LaPrade*, 524 F. 2d 862, 872 (3rd Cir. 1975). The Court of Appeals found that Respondents had acted in good faith when they discharged the Petitioner without affording him necessary procedural safeguards. 523 F. 2d 569, 578. Thus, punitive damages should not have been and were not assessed.

Petitioner's second example regarding a fourth amendment damage action would for the sake of logical consistency only require in this cause, that he be allowed to recover damage for violation of his right to procedural due process, regardless of the outcome of his contract claim. The Court of Appeals has held that he is entitled to damages for violation of that right

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although he was unsuccessful in proving damage to his contractual rights.

Finally, Dr. Hostrop requests that this Court adopt the decision in *Horton* v. *Orange County Board of Education*, 464 F. 2d 536 (4th Cir. 1972). The holding of this decision regarding damages contravenes every other Federal Appellate Court decision which is apposite. Furthermore, it affords him a windfall because had he been offered a hearing before an unbiased tribunal, he would have been terminated. Taxpayers should not be obligated to pay contract wages to an individual who materially breached that contract because its public agent blundered, in good faith, by failing to accord him a hearing required by the Constitution.

II.

The Petitioner's second Question Presented for Review clearly does not establish an appropriate reason for granting his Petition. The Petitioner has failed to indicate in any fashion how the opinion of the Court of Appeals either directly conflicts with any applicable decisions of this Court, or directly conflicts with any decisions of the same or other Courts of Appeals. Very simply, Dr. Hostrop attempts instead, in Argument II of his Petition, to re-argue the merits of his case before this, the highest of tribunals, after having failed at trial and on appeal. Faced with fatal findings of fact at the two lower courts, the Petitioner would now have this Court consider his first amendment claim solely as a matter of legal absolutes, *in vacuo*, totally devoid of the factual realities surrounding his employment relationship with the Respondent Board of Trustees. Indeed, the state of facts adduced at trial is so antithetical to his first amendment claim that the Petitioner chooses to act as if the record below does not exist, and, incredibly, states in his Petition that:

> "Neither the District Court nor the Court of Appeals has pointed to any facts in this record which would support a finding that the publication of this memorandum, re-

> gardless of the manner in which it either was or was not disseminated, materially or substantially interfered with the requirements of appropriate discipline in the operation of the school".[1]

Having thus disposed of troublesome facts, the Petitioner states as the legal basis for his first amendment claim herein, and ostensibly as the reason why Certiorari should be granted, the postulate that "First Amendment rights may not be denied under the guise that it is the manner of expression rather than the content which is being punished." Such a characterization of the freedom of speech issue clearly assumes too much, for it implicitly assumes that there exists a protectible first amendment right to begin with. But the Petitioner cannot possibly mean to say that a state employee's right to freedom of speech is absolute, and that the content of his expression may *never* be curtailed under any circumstances, for it is the most basic of constitutional precepts that, *upon certain factual showing,* a State employer's interest in curtailing an expression of opinion may, on balance, outweigh the State employee's right to express that opinion. *Pickering* v. *Board of Education,* 391 U. S. 563, 568 (1968). The object of curtailment, and cause for discharge, may indeed be the very content or substance of that expression. *Pickering* v. *Board of Education,* 391 U. S. 563, 570 n. 3 (1968); *Arnett* v. *Kennedy,* 416 U. S. 134, 160-162 (1974).

Therefore, even if we were to assume *only for argument's sake* that the Petitioner's legal postulate is correct and that the first amendment's protection of the *manner* of expression is always qualitatively co-existent with that protection to be afforded to

1. If, as Dr. Hostrop incorrectly suggests *in his Petition, it* is difficult to pinpoint in the record the deleterious effect on the College's operation which may be specifically attributed to the Ethnic Studies Memo, the difficulty is wrought by the fact of Petitioner's pervasive incompetence and insubordination, a factor which makes it impossible to allocate a quantum of adverse impact to any *single* act of insubordination.

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the substance of expression,[2] the Petitioner can take no solace whatsoever in the mere reiteration of that premise, as *both* the manner and content of expression are proper subjects of regulation in special circumstances. The special circumstances surrounding Dr. Hostrop's employment by the Board of Trustees have not escaped either the District Court or Court of Appeals below, namely, the close working relationship between a Board of Trustees and its chief executive officer, and the collapse of that relationship due to the insubordination and incompetence of the chief executive officer, all of which adversely affects the normal administration of the governmental entity.

The District Court found, and the Court of Appeals concurred specially in the finding, that certain conduct of the Petitioner, *including the timing and concealment of the Ethnic Studies Memo,* "substantially impeded the Board's normal functions, critically impaired the personal working relationship between the parties, and completely destroyed the Board's confidence in the Petitioner's loyalty and abilities." In its first *Hostrop* opinion, the Court of Appeals held that Petitioner's complaint, on its face, stated a cause of action for denial of first amendment rights. However, in contemplation of the upcoming trial on remand, the Court of Appeals conceded that:

> "[d]efendants may demonstrate at trial that Dr. Hostrop's circulation of the memorandum was evidence of insubordination and actually produced the harmful effects which the *Pickering* decision indicated may be grounds for discharge. Such evidence could justify the discharge." 471 F. 2d 488, 493 n. 14 (7th Cir., 1972).

Such evidence *was* found at trial, and the timing and concealment of the Ethnic Studies Memo was held by both lower courts

2. Indeed, the assumption is fundamentally *incorrect.* Though speech itself may be under the first amendment, the manner of its exercise or its collateral aspects may fall beyond the scope of the amendment. *Grayned* v. *City of Rockford,* 408 U. S. 104, 116-118 (1972); Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment,* 79 Harvard Law Review 1, 5 (1965).

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to be a permissible cause for discharge in light of the resultant deterioration of the necessary trust and confidence between the parties. The Petitioner and Respondents herein have both cited the *Pickering* case as favorable and, but for the ugly fact of the record below, Petitioner's citations of *Pickering* might be persuasive. However, the Petitioner may not now seek certiorari to have this Court review evidence and discuss specific facts. *United States* v. *Johnson*, 268 U. S. 220, 227. The instant Petition has not established a single reason why this Court should exercise its jurisdiction. Indeed, the very cases cited by the Petitioner require the result arrived at by the Court of Appeals below.

CONCLUSION.

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied or, in the alternative, such Petition for a Writ of Certiorari should be granted and, as to the issues presented herein, the Opinion of the Court of Appeals be summarily affirmed on the basis of the Opinion of that Court.

Respectfully submitted,

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